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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5212

ELAINE W. KERR, *Petitioner*

v.

TRAVELERS INSURANCE COMPANY, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The Order of the Court of Appeals denying Petitioner's petition for a rehearing is unreported. Likewise, the opinion of the District Court was not reported. Both opinions and the order are annexed to the petition as appendices.

JURISDICTION

Petitioner invokes the jurisdiction of this Court via 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner asserts that the questions presented for review are, in effect, (1) whether a court may consider a conviction in a criminal case to be determinative of the truth of the facts in a civil case between a complaining witness and a defendant, and (2) whether the dismissal of a Fraud count and a consent judgment on a negligence count establishes some sort of a property right in the party defendant, judgment-debtor, in such an instance.

Respondent respectfully suggests that the first question as phrased is not supported by either the trial court's opinion, nor by the appellate ruling, nor by the record. The more accurate phrasing should be:

(1) whether a guilty plea by a defendant in a criminal matter may be considered as some evidence, at least, of the truth of the matters contained in the indictment to which the plea is addressed.

With respect to Petitioner's second question, the more appropriate inquiries are twofold:

(2) whether the record supports Petitioner's contention that she was denied a hearing,

(3) whether the trier of fact, on the issue of insurability, is bound by the terms of a consent decree on the issue of liability.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent denies that this Petition raises any Constitutional issue.

STATEMENT OF THE CASE

Petitioner, an attorney and resident of the State of Virginia, was sued by one Frances K. Mager for negligently and/or fraudulently releasing a Deed of Trust securing two loans to Capital Investors Company. It was alleged that while one Kenneth Friedlander was named as the secured party, the promissory notes secured thereby were due to the plaintiff. Plaintiff Mager further alleged that by reason of her interest in the notes, the Petitioner was negligent and/or fraudulent in releasing the Deed of Trust without seeing to it that repayment of the proceeds had been made to her. The Complaint was in two counts, one ostensibly in negligence and the second for fraud. Petitioner in turn impleaded Travelers Insurance Company as third-party defendant alleging that she was insured under a Professional Liability Policy issued to her by Travelers. She demanded a judgment against Travelers for her costs and expenses incident to her defense of the action against her. Travelers denied that a policy of insurance had been issued to her and denied that policy, if issued, would have covered the claim asserted.

The matter came to trial before the Honorable Albert V. Bryan, Jr., Judge, in the United States District Court for the Eastern District of Virginia. At the commencement of the trial it was stipulated by all parties thereto that the initial claim be tried first before a jury and the third-party claim be tried separately by the Court. Counsel for Respondent was present but it was agreed that he would not participate in the adjudication of the initial case.

During the presentation of the evidence on behalf of the Petitioner, a compromise agreement was reached between plaintiff and Petitioner for the sum of $65,-

000.00. At the request of counsel for the Petitioner, the Court dismissed the fraud count and entered judgment against Petitioner for $65,000.00 on the negligence count. Respondent did not participate in either the compromise or the entry of judgment.

The threshold question to be answered in deciding the third-party claim was whether the plaintiff's claim could be compensated by insurance. The trial court, having heard plaintiff's evidence, suggested that the third-party claim could be decided upon the basis of the evidence already introduced and memoranda of law submitted by counsel. Pursuant to this suggestion, counsel for both Petitioner and Respondent submitted written memoranda on the legal issues involved. On September 10, 1971, having considered the pleadings, evidence at trial and memoranda of counsel the trial court entered judgment for Respondent. The evidence included Petitioner's plea of guilty to an indictment in the District of Columbia charging her with, inter alia, defrauding plaintiff.

The judgment of the trial court was appealed to the United States Court of Appeals for the Fourth Circuit which affirmed, per curiam. Upon denial of a rehearing by the Court, Petitioner seeks a Writ of Certiorari.

ARGUMENT

The initial issue concerns the propriety of the trial court's reliance upon a plea of guilty in a criminal case as some evidence of the truth of the same facts being adjudicated in a civil case. Reference is made to the opinion of the trial court (Petitioner's Appendix C) wherein it is stated:

> "An examination of the 'negligence' Count reveals that except for the words 'negligence' and

> 'negligently' in paragraphs 11 and 12 thereof, the basic allegations are of willful misrepresentation and deliberate act on the part of the defendant. This conclusion is further supported by the evidence which the Court heard on August 24 and 25, including the defendant's plea of guilty in the District of Columbia."

The plain language of the opinion yields of no other interpretation than that the Court's decision was based upon the pleadings and evidence at trial, which included Petitioner's plea of guilty. This guilty plea was prompted by an indictment rendered in the District of Columbia charging Petitioner, inter alia, with defrauding the plaintiff.

Any representation made to this Court that there is conflict in the Circuit Courts on this issue is palpably erroneous. Likewise, any inference that the decision in this case is at variance with controlling decisions of this Court, is entirely without merit. Petitioner's reliance upon the case of *Chantango* v. *Abaroa*, 218 U.S. 476, 31 S.Ct. 34, 54 L.Ed. 1116 only supports this proposition.

Respondent refers this Honorable Court to a long line of Circuit Court decisions which firmly establish the admissibility of guilty pleas in a related civil suit. *Logan Square Auto Mart, Inc.* v. *C.I.R.*, 291 F.2d 136 (7th Cir. 1961); *Dunham* v. *Pannell*, 263 F.2d 725 (5th Cir. 1959); *Levelle* v. *Powers*, 248 F.2d 774 (10th Cir. 1957). The treatment of this particular issue in the Circuit Courts has been one of marked uniformity. *Rain* v. *Pavkov*, 357 F.2d 506 (3rd Cir. 1966); *Eschellbach* v. *William S. Scull Co., Inc.* 293 F.2d 599 (3rd Cir. 1961). Such a consensus of opinion among the various Circuit Courts is only reached on issues which

are well settled in reason and law. A plea of guilty to facts charged in an indictment is a solemn judicial admission of the truth of those facts. As an admission, it is competent evidence inasmuch as it is some showing that the facts charged in the indictment are true, *Kreps* v. *C.I.R.*, 351 F.2d 1 (2nd Cir. 1965); *Home Indemnity Co. of New York* v. *Standard Accident Insurance Co. of Detroit*, 167 F.2d 919 (9th Cir. 1948).

Petitioner alleges that there is division in the Circuit Courts upon the admissibility of a guilty plea. However, the Petition itself is markedly devoid of any citation to cases establishing that proposition. In truth and in fact, this particular issue has been treated with a uniformity that doesn't admit of exception. The instant case only conforms with the host of precedents before it. The singular reason offered by Petitioner for granting a Writ of Certiorari in this instance is some ostensible conflict in the Circuit Courts. In reality however, there is not even a pretense of divergence amongst those Courts on this issue and therefore Respondent respectfully suggests that this Petition be denied.

Petitioner's Fifth Amendment claim is similarly without foundation. At the trial of the instant case it was stipulated by counsel that the initial claim between plaintiff and Petitioner would be tried before a jury and Petitioner's claim against Respondent would be decided subsequently by the Court. At the conclusion of plaintiff's evidence, the learned trial judge suggested that Petitioner's third-party claim could be decided on the basis of the evidence already introduced, in addition to any written memoranda which the parties felt obliged to submit in support of their respective positions.

The allegation that Petitioner was denied a hearing must be viewed in light of a transcript of trial proceedings consisting of 291 pages; Petitioner's stipulation that the matter be decided by the Court; and her submission of a memorandum on the legal issues in anticipation of that Court's decision. Indeed, it is not surprising that Petitioner cites no cases in support of her Fifth Amendment claim.

Respondent is not oblivious to the gravity of the denial of ones rights under the Fifth Amendment. Respondent merely represents to this Honorable Court that the record in this case clearly establishes that Petitioner's right to a hearing was not denied her. The record further establishes that there is no cognizable Fifth Amendment issue herein and therefore this Court's exercise of supervision would be extravagant under the circumstances.

That this Honorable Court recognizes the propriety and efficacy of stipulations between counsel is not subject to dispute. *Utah* v. *United States,* 394 U.S. 89, 22 L.Ed.2d 99, 89 S.Ct. 761 (1969). This Court has further recognized that where there are special and persuasive reasons, distinct causes of action asserted in the same case may be made the subjects of separate trials. *Miller* v. *American Bonding Co.,* 257 U.S. 304, 42 S.Ct. 98, 66 L.Ed. 250 (1921).

Much is said of a woman's prerogative but courts will not condone such vacillation. Once having stipulated or agreed to certain facts or procedure, the parties thereto will be bound by their stipulation. *Southern Railway Co.* v. *Tift,* 206 U.S. 428, 51 L.Ed. 1124, 27 S.Ct. 709 (1906). Petitioner, having agreed that the issues were severable and having acknowledged her complicity in the separate trial of such issues, will

be held to her agreement. Likewise, having agreed that the trial court could consider the evidence before it, and having submitted memorandum on the legal issues, she cannot thereafter seriously contend that her Fifth Amendment rights have been compromised. This reputed Fifth Amendment issue raises no Constitutional question. The exercise by this Court of jurisdiction over this matter under the pretense of deciding a constitutional question would be futile indeed.

The final argument upon which Petitioner relies, attacks a routine finding of fact made by the trier of fact and based upon the evidence. Such findings are the rudimentary elements of our system of jurisprudence and they neither require nor merit this Honorable Court's time or supervision. Solicitation of a Writ of Certiorari, based upon a contested finding of fact, evidences a fundamental misconception of both the role of this Court and the customary reasons underlying the grant of such Writs.

Since the issues in this case were viewed as severable, Petitioner's liability was to be tried first and questions of insurability and insurance were to be tried subsequently. The case of *Cadwallader* v. *New Amsterdam Casualty Company,* 396 Pa. 582, 152 A.2d 484 (1959), upon which Petitioner relies, is readily distinguishable here. In the *Cadwallader* case id., the existence of an insurance policy was not contested, whereas in the instant case Respondent could not, in good faith, assume defense of the matter while steadfastly denying the existence of a policy. Another distinguishable aspect of the *Cadwallader* case was that no division of the issues was obtained, the entire matter was tried in one proceeding. In the instant case, at the close of plaintiff's evidence on the question of liability, Petitioner consented to settle the matter

for $65,000.00. Petitioner would have the terms of this consent decree viewed as binding upon the Court when she had previously agreed that the issue of insurance coverage was to be adjudicated by the Court at a later time. The trial court, in entering judgment, was merely exercising an administrative function, recording what had been agreed between the parties. *Texas and Pacific Railway Co.* v. *Southern Pacific Co.*, 137 U.S. 48, 11 S.Ct. 10, 34 L.Ed. 614 (1890). When a court, in exercise of a purely administrative function, records such an agreement, it is subject to collateral attack. *Texas and Pacific Railway Co.* v. *Southern Pacific Co.*, id.; *Sealol Corp.* v. *Flexibox Ltd.*, 242 F.Supp. 693 (D.C.D.C. 1965). Consent decrees of the character here involved, based solely upon the agreement of the parties and not involving any inquiry into or determination by the Court of any legal or factual issues, will not sustain a plea of estoppel when collaterally attacked. *United States* v. *International Building Co.*, 345 U.S. 502, 97 L.Ed. 1182, 73 S.Ct. 807 (1952).

The learned trial judge, exhibiting an uncommon familiarity with these matters states in his opinion (Petitioner's Appendix C):

> "While the Fraud Count was dismissed with prejudice by agreement and the judgment consented to was on the Negligence Count, I do not feel the Court is bound by the description of that count as one in negligence."

Indeed the trial court was not bound by such description. The trial court was vested with the responsibility of weighing the evidence and rendering a decision on the ultimate issue of insurability. Having considered the evidence the Court determined that plaintiff's claim was essentially one of fraud and willful acts

which, as a matter of public policy was not compensable by any insurance. This determination of fact was corroborated by Petitioner's plea of guilty to an indictment charging her with defrauding the plaintiff. Such commonplace findings of fact by the trier of fact, based upon the evidence, are routinely made in courts throughout this Nation. They are not, it is respectfully suggested the substance upon which Writs of Certiorari are customarily granted.

Petitioner, in an attempt to obtain review by this Honorable Court, has sought to establish a conflict among the Circuit Courts where there is none. Petitioner has further sought to raise a Constitutional issue which the record conclusively establishes does not exist. Finally, Petitioner seeks vainly to contest a finding of fact as grounds upon which a Writ of Certiorari should be granted. Respondent respectfully suggests that this Petition fails to establish any grounds for the grant of a Writ of Certiorari and therefore its allowance would be improvident under the circumstances.

CONCLUSION

For the reasons stated above, Respondent respectfully suggests that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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